

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts Regarding Dark Fiber
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Docket No. 98-116

**COMMENTS OF GLOBAL NAPs, INC.**

Global NAPs, Inc. (“Global NAPs”) respectfully files these comments on the impact of the FCC’s recent order regarding ISP-bound calling on the matters before the Department.<sup>1</sup>

**1. Retroactive Effects.**

The FCC’s new order does not purport to affect the terms of existing contracts of its own force. Instead, *ISP Remand Order* forthrightly acknowledges that it works a radical change in the legal analysis applicable to compensation for ISP-bound calls. To the contrary, it states that its new analysis is to have prospective effect only. *ISP Remand Order* at ¶¶ 49, 82. It follows that whatever contractual obligations an ILEC may have had with respect to ISP-bound calls sent to a particular CLEC prior to the effective date of the new order (which Global NAPs understands to be on or about June 14, 2001) are completely unaffected by the *ISP Remand Order*. Moreover, to the extent that questions exist with respect to the meaning of possibly unclear contractual terms, the parties’ intent in agreeing to those terms obviously cannot have been affected by the new FCC order. *See, e.g., Illinois Bell v. Worldcom*, 1999 U.S. App. LEXIS 20635 (7<sup>th</sup> Cir., August 19, 1999).

For these reasons, the *ISP Remand Order* has no effect whatsoever on the matters formally “before” the Department in this matter. Verizon either owes compensation for ISP-bound calls under

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<sup>1</sup> Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*,

pre-existing contracts, or it does not. That is to be determined by a review of the language of the contracts and the parties' intent at the time. Since the parties' intent cannot possibly have been affected by the *ISP Remand Order*, that order is irrelevant to the parties' obligations under their contracts. For this same reason, Global NAPs incorporates by reference its prior comments and other filings before the Department, which remain relevant to the question of parties' obligations under their *existing* contracts. Again, the proper answer to that question is unaffected by the *ISP Remand Order*.

## **2. Prospective Effects.**

The *ISP Remand Order* has prospective effects, but what they are will vary from case to case. This is because the FCC said expressly that it did not intend its order to affect existing contractual relationships. *ISP Remand Order* at ¶ 82. Existing contracts say what they say and mean what they mean, even going forward after the FCC's order. As those contracts expire and are renegotiated, however, the new regime established in the *ISP Remand Order* takes effect.<sup>2</sup>

The exception to this general rule may exist on a case-by-case basis, depending on the content of particular interconnection agreements. As the *ISP Remand Order* notes, interconnection agreements may contain "change of law" provisions that permit or require the parties to modify their contractual relationship to take account of changes in law. *Id.* The *ISP Remand Order*, by totally repudiating nearly five years of settled interpretation of the meaning and scope of Section 251(b)(5) of the federal Communications Act, is plainly a "change" in law under common usage of that term, although whether it

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CC Dkt. Nos. 96-98 and 99-68, FCC 01-131 (rel. April 27, 2001) ("*ISP Remand Order*").

<sup>2</sup> That is, Verizon, the ILEC, may elect to take advantage of the rate- and minute-caps set out in the *ISP Remand Order*, including an obligation to make whatever lower rate it seeks to apply to ISP-bound traffic under the new regime to all local traffic, including landline and wireless traffic. Global NAPs strongly urges the Department to be extremely vigilant in enforcing these nondiscrimination provisions of the *ISP Remand Order*, since Verizon has an obvious interest in gaming the system, if it can, to pay little or nothing for ISP-bound calls, but still receive high rates for landline and wireless calls

is a “change” for purposes of any particular contract will depend, entirely, on the language of the contract.

Parties, of course, may be unable to agree whether their existing contracts need to be modified in light of the *ISP Remand Order*, and, if so, how. The Department would, in the normal course, be the forum for resolving any such disputes, which would amount to disagreements about the interpretation of interconnection agreements.

### **3. Policy Effects.**

While its effects on particular contracts retrospectively is zero, and its effects on particular contracts prospectively will vary from case to case, the Department may reasonably consider the policy implications of the *ISP Remand Order* in its decisionmaking. Broadly stated, the *ISP Remand Order* recognizes that serving ISPs entails costs, and always has. Accordingly, it would be inconsistent with the *ISP Remand Order*, as well as with the parties’ contracts, to hold that a rate of zero compensation applies to ISP-bound calls under existing contracts. Indeed, a holding retrospectively that the appropriate rate is zero would plainly be confiscatory.

Second, the *ISP Remand Order* makes clear that there is no basis for establishing a different rate for ISP-bound calls, on the one hand, and traditional voice calls, on the other. *ISP Remand Order* ¶¶ 90-91. Consequently, whatever non-zero rate the Department concludes should apply in existing contracts should be the same rate for both traditional voice and ISP-bound calls. Indeed, in light of the considerations the FCC articulated in developing its initial rate of \$0.0015 per minute, clearly on a retrospective basis a higher rate than that would be appropriate.

Considering all these factors, the Department could reasonably encourage parties to settle existing disputes about existing contracts, and provide guidance as to what the Department considers a

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it *receives*.

reasonable settlement figure. While the Department is not legally empowered to force parties to compromise their respective contractual rights, perhaps it could, in light of the broad structure of the *ISP Remand Order*, nonetheless encourage parties to do so.

Finally, Global NAPs notes that it concurs in the comments filed today by WorldCom, Inc.

Respectfully submitted,

**GLOBAL NAPs, INC.**

By:

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